No. 11,098

United States Circuit Court of Appeals

For the Ninth Circuit

Stella Wheeler Bishop,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

PETITIONER'S OPENING BRIEF

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PETITIONER'S OPENING BRIEF

STATEMENT OF PLEADINGS AND FACTS SHOWING JURISDICTION

This case comes before this Court upon petition for review of a decision of The Tax Court of the United States finding a deficiency of income taxes in the amount of $1,070.23 to be due from petitioner for the year 1940.

The case was tried before The Tax Court on pleadings consisting of a petition (R. 3), an answer thereto (R. 19), and a stipulation of facts (R. 22).

Note: All italics are added unless otherwise noted.

The petition to The Tax Court was filed on April 20, 1944 (R. 1), within 90 days after the mailing of the notice of deficiency (R. 4). The Tax Court had jurisdiction under Sections 272 and 1101 of the Internal Revenue Code.

The petition for review was filed on June 18, 1945, within three months after the decision of The Tax Court was rendered (R. 2).

Petitioner's income tax return for the year 1940 was filed with the Collector of Internal Revenue for the First Collection District of California (R. 1, 20), located in the City and County of San Francisco, which is within the jurisdiction of this Court. This Court has jurisdiction under Sections 1141 and 1142 of the Internal Revenue Code.

STATEMENT OF THE CASE

This case presents important issues relating to the income tax status of California community property acquired after July 29, 1927, in which the wife has "a present, equal and existing" interest under California Civil Code Section 161a from the time such property is originally acquired by the husband and wife.

The principal issue involved in the case is whether petitioner, a widow, is entitled to deduct one-half the loss sustained upon a sale of such property made while her husband's estate is being administered; or whether the entire amount of the loss must be deducted by the estate.

The Tax Court held (five judges dissenting) that the entire amount of the loss must be deducted by the estate (R. 30).

The Tax Court's decision was based upon the paradoxical premise that the husband's estate is the owner of the entire community property, since all of it is subject to administration, although the husband was the owner of only one-half the property during his lifetime.

We contend that The Tax Court's decision was in error because during administration of her husband's estate the widow continues to be the owner of one-half of such community property, as she was prior to her husband's death. Consequently, during such period she is entitled to deduct one-half the losses from the sale thereof, as she was during her husband's lifetime. Nothing happens upon her husband's death that would divest her pre-existing ownership of one-half the property; on the contrary, such ownership becomes absolute, because the husband's broad powers of management and control are eliminated by his death, and are replaced by the much more limited powers of his personal representative. If the husband, with the broad powers he had over all the community property, was the owner of only one-half of it, it surely must follow that his personal representative, with much less control, owns no greater share.

Subordinate issues in the case are whether taxes upon community property acquired by petitioner and her husband after July 29, 1927, paid by the husband's estate with funds constituting such property, are deductible in their entirety by the husband's estate, or one-half by the widow; and whether petitioner, who was co-executrix of the husband's estate, is taxable upon the full amount or only one-half of her executrix' fee paid from funds constituting such property. These issues also were resolved against petitioner by The Tax Court, upon the same grounds as it relied upon in deciding the principal issue.

The Facts.

Petitioner and her husband, Roy N. Bishop, were married in 1907 and were residents of California continuously from the year 1909 to December 20, 1938, when Roy N. Bishop died (R. 28).

Thereafter petitioner and Crocker First National Bank of San Francisco were appointed as executors of the will of Roy N. Bishop (R. 28). In the year 1940, acting as such executors, they sold certain securities that had been acquired by petitioner and Roy N. Bishop between April 20, 1931 and October 29, 1937 (R. 28). These securities constituted California community property of petitioner and Roy N. Bishop continuously from the time they were acquired until the time Roy N. Bishop died (R. 28); and none of them were acquired with funds acquired, or representing the proceeds of property acquired, prior to July 29, 1927 (R.24). The net proceeds of sale of the securities were $33,686.77 less than the cost thereof (R. 23, 26, 28). The expenses of sale were paid from funds constituting California community property of petitioner and Roy N. Bishop acquired after July 29, 1927 (R. 29).

During the year 1940, the estate of Roy N. Bishop paid transfer taxes of $461.48 on the sale of the above-mentioned securities, and paid a tax of $34 on an automobile that constituted community property of petitioner and Roy N. Bishop acquired after July 29, 1927 (R. 29). The funds from which these taxes were paid constituted community property of petitioner and Roy N. Bishop acquired after July 29, 1927 (R. 29).

During the year 1940, the sum of $4 income tax was withheld at source on tax-free covenant bonds which constituted community property of petitioner and Roy N. Bishop acquired after July 29, 1927 (R. 9).

During the year 1940, petitioner was paid $1,928.09 by the Estate of Roy N. Bishop, Deceased, as her executrix' fee. The fee was paid from funds constituting community property of petitioner and Roy N. Bishop acquired after July 29, 1927 (R. 29).

Petitioner deducted one-half of the loss on the sale of the above-mentioned securities and one-half of the above-mentioned taxes in computing her net income for 1940. Likewise, petitioner only included one-half of the executrix' fee in her gross income. Consistently, petitioner included in her gross income one-half of the income received by the estate of Roy N. Bishop from certain bank accounts and securities constituting community property of petitioner and Roy N. Bishop acquired after July 29, 1927 (R. 29, 30). The Commissioner disallowed the deductions, eliminated from petitioner's gross income one-half of the gross income received by the estate of Roy N. Bishop from such community property, and included the entire amount of the executrix' fee in petitioner's gross income (R. 30).

If the issues in this case are determined in petitioner's favor, petitioner is entitled to a refund for the year 1940 arising out of a reduction in taxable amount (conceded by respondent, R. 29) of a dividend received by petitioner in 1940 from Pacific Lumber Company (R. 10, 21, 29); and if this Court reverses the decision of The Tax Court the cause should be remanded to The Tax Court for determination of the amount of the refund.

SPECIFICATION OF ERRORS

(1) The Tax Court of the United States erred in deciding that the entire loss sustained upon the sale of certain stocks by petitioner and Crocker First National Bank of San Francisco, as executors of the will of Roy N. Bishop, deceased, was deductible by the estate of Roy N. Bishop, deceased, in computing the net income of the estate for the year 1940, and that petitioner was not entitled to deduct one-half the loss.

(2) The Tax Court of the United States erred in deciding that petitioner was taxable on the full amount, to-wit, $1,928.09, instead of one-half of the fee received by her in 1940 as executrix of the will of Roy N. Bishop.

(3) The Tax Court of the United States erred in deciding that the entire amount of transfer taxes of $461.48 paid by the estate of Roy N. Bishop, and a tax of $34 paid by said estate on an automobile, were deductible in their entirety by the estate, and that petitioner was not entitled to deduct one-half thereof.

(4) The Tax Court of the United States erred in deciding that the estate of Roy N. Bishop, deceased, was entitled to the full amount of a credit for $4 for income tax withheld at source in 1940 on tax-free covenant bonds, and that petitioner was not entitled to one-half of such credit.

(5) The Tax Court of the United States erred in not determining that petitioner was entitled to a refund of income tax in the amount of $1,198.63 for the year 1940, claimed in petitioner's petition to The Tax Court (R.11).

ARGUMENT

The principal question involved in this case, as previously stated, is whether petitioner, a widow, is entitled to deduct one-half of the losses sustained on sales made during administration of her husband's estate, of stocks constituting California community property acquired after July 29, 1927; or whether the husband's estate must deduct the entire amount of such losses.

The Tax Court held (five judges dissenting) that the estate must deduct the entire amount of such losses, because all of such property is subject to administration, and the estate, therefore, must be the owner of all the property.

We contend that this decision was in error because the husband's estate could not possibly be the owner, under California law, of a greater share of the community property than was the husband. Petitioner was the owner of one-half of the property from the time it was acquired; her ownership was not divested by her husband's death; and she was entitled to deduct one-half the losses, just as she would have been entitled to deduct them had the sales been made prior to her husband's death.

A. THE TAX COURT'S DECISION

The majority opinion of The Tax Court concedes that the precise question involved here has not hitherto been decided by this Court, but states that this Court's decision in *Commissioner v. Larson* (C.C.A. 9th, 1943), 131 F.2d 85, requires an answer contrary to petitioner's contentions. The majority opinion says of the *Larson* case:

> "In that case the Court had under consideration a Washington statute substantially similar to the Cali-

fornia statute here involved and in its opinion reached the conclusion that because the entire estate was subject to administration in the estate of the deceased husband, the income was 'owned' by the executor or administrator and should be returned in its entirety by him." (R. 30)

The majority also relied, but to a lesser extent, upon *Rosenberg v. Commissioner* (C.C.A. 9th, 1940), 115 F.2d 910. The majority said of the *Rosenberg* case:

> "As we understand *Commissioner v. Larson*, supra, and *Rosenberg v. Commissioner,* 115 F.2d 910, which latter case was also decided by the 9th Circuit, the income from community property during the period of the administration is taxable in its entirety to the executor or administrator and one-half of it may not be returned by the surviving spouse." (R. 31)

These two cases form the entire basis for the decision of the majority.

Neither the *Larson* case nor the *Rosenberg* case is in any way inconsistent with petitioner's position in the instant case.

The *Larson* case held, as The Tax Court majority opinion stated, that all income from Washington community property is taxable to the husband's estate while the estate is being administered. The Court so decided because it found that in Washington title to all the community property passes to the husband's personal representative. The *Larson* case is authority, therefore, for the proposition that taxability follows ownership, which is the point we maintain in this case. But the *Larson* case determined that in *Washington* the husband's estate is the owner of all the community property; it did not determine that in *California* the estate is the owner of all the community property. In Washington, as in California, the wife is the owner of one-half the community property during the husband's lifetime. *Poe v. Seaborn* (1930), 282 U.S. 101. There is, however, a vital difference between Washington law and California law as respects title to the community personal property *after* the husband's death. Under Washington law, as this Court took pains to point out in the *Larson* case, title to all the community personal property passes to the husband's personal representative. *Devereaux v. Anderson* (1928), 146 Wash. 657, 264 Pac. 422. In contrast, the California statutes expressly provide that upon the husband's death, the wife's half of the community property "belongs" to her. (Sec. 201, Cal. Probate Code.) *This provision is not found in the Washington statutes.* The Washington statutes are therefore vitally different from the California statutes in the respects controlling in this case. As Judge Opper said in his concurring opinion in *Estate of James F. Waters* (1944), 3 T.C. 407:

> "* * * And unlike Commissioner v. Larson this proceeding deals with a California statute which grants to the executor only possession of the community property, as distinguished from Washington, where 'title to the personal property vests in the executor or administrator.' "

It follows that the *Larson* case is not controlling here, nor is it inconsistent with petitioner's position; on the contrary, the principle upon which it was based, that taxability follows ownership, is the identical principle for which we are contending.

The *Rosenberg* case is likewise not in point; it held only that all of the income from community property acquired *prior to* July 29, 1927, as to which the wife had only an expectancy during the husband's lifetime, is taxable to the husband's personal representative after his death, as it was taxable to the husband before then. The decision is authority for the proposition that pre-1927 community property has the same tax status after the husband's death as it has before that time, which is in no way inconsistent with our position that post-1927 community property also has the same status after the husband's death as it had before.

It must also be emphasized that both the *Rosenberg* and *Larson* cases involve the taxability of *income*, while in the present case the primary issue is the deductibility of *losses*. Whatever conclusion might be reached on the ownership of the *income* from the property during administration, the issue in this case is the ownership of the property itself. No one can sustain a loss on property except the person who owns the property. Once it is established that the wife's ownership of one-half the post-1927 community property continues during administration of her husband's estate, the conclusion necessarily follows that any loss on the sale of that one-half interest must be her loss.

The dissenting opinion.

Judge van Fossan, who presided at the hearing before The Tax Court, filed a dissenting opinion, concurred in by Judges Mellott, Arnold, Disney and Opper (R. 32).

Judge van Fossan's dissenting opinion points out that the *Larson* and *Rosenberg* cases are not controlling for the reasons we have stated above; it concludes that, under California law, it is inescapable that the wife is the owner of one-half the community property after her husband's death, as she was before, and that she is therefore entitled to deduct one-half the losses sustained upon its sale.

The conclusion reached by the dissenting opinion is based upon a careful and accurate statement of California law; and we submit that the reasoning of the dissenting opinion is entirely sound. We will not stop here, however, to analyze the opinion, since its arguments largely parallel those made in this brief.

B. THE TEST OF TAXABILITY IS OWNERSHIP

The majority of The Tax Court seemingly recognized that the question of ownership of property determines who shall deduct losses sustained upon its sale, although the majority was in error, we contend, in determining that the estate was the owner of the entire property.

For two reasons, however, we wish to place particular emphasis upon the point that the test is ownership, and not control over the property. The first reason is that the error of The Tax Court is not conclusively established without proof that ownership, and not control, is the test applied by the income tax laws to determine who shall return income from property and who shall deduct losses sustained upon its sale. The second reason is that ownership is of peculiar significance in this case because the primary question is who shall deduct a loss, not who shall return income.

As Judge van Fossan stated in his dissenting opinion in this case,

> "If anything is basic in income tax law, it is that ownership of property determines the taxability of income earned by or derived from it. *Blair v. Commissioner,* 300 U.S. 5; *Helvering v. Clifford,* 309 U.S. 331." (R. 34)

This doctrine was succinctly stated in *Poe v. Seaborn* (1930), 282 U.S. 101, which held that the wife is taxable upon one-half the income from Washington community property:

> "The case requires us to construe sections 210(a) and 211(a) of the Revenue Act of 1926 (U.S.C. App., Tit. 26, Secs. 951 and 952), and apply them, as construed, to the interests of husband and wife in community property under the law of Washington. These sections lay a tax upon *the net income of every individual.*[1] The Act goes no farther, and furnishes no other standard or definition of what constitutes an individual's income. *The use of the word 'of' denotes ownership.* It would be a strained construction which, in the absence of further definition by Congress, should impute a broader significance to the phrase."

[1] "The language has been the same in each Act since that of February 24, 1919 (40 Stat. 1057)."

The decision in *Poe v. Seaborn* is of particular significance here, because the question before the Court was whether the husband's powers of control over all the Washington community property (virtually identical with the husband's powers over all the California community property) made all the income from Washington community property taxable to the husband; or whether the wife's ownership of one-half the community property made one-half the income taxable to her.

The provisions of the Internal Revenue Code in effect in 1940, the year involved here, were identical with the parallel provisions of the Revenue Act of 1926, which was construed in *Poe v. Seaborn.* Section 11 of the Internal Revenue Code provides in part that "There shall be levied, collected, and paid for each taxable year upon the net income *of every individual* a normal tax . . ." etc. Section 12(b), providing for a surtax, contains similar language. Section 23(e) provides in part that "In computing net income there shall be allowed as deductions: (e) * * * In the case of an individual, losses *sustained* during the taxable year * * *". Section 161 provides that "The taxes imposed by this chapter upon individuals shall apply to the income *of estates* or of any kind of property held in trust * * *". Section 162 provides that "The net income *of the estate* shall be computed in the same manner and on the same basis as in the case of an individual * * *".

Thus the Internal Revenue Code applies the same test, to-wit, ownership, as did the Revenue Act of 1926, construed in *Poe v. Seaborn.*

So far as losses are concerned, it is axiomatic that a loss is sustained, and hence deductible, only by the owner of the property involved. *Anderson v. Wilson* (1933), 289 U.S. 20.

The test of ownership applies in full force to California community property. It was held in *Malcolm v. United States* (1931), 282 U.S. 792, that one-half the income from California community property acquired after July 29, 1927, is taxable to the wife during the husband's lifetime. Thus, taxability in this instance, as in others, depends upon ownership; and the extensive powers of management and control by the husband over all the community property, which apply equally to pre-1927 and post-1927 community property, are not sufficient to make the husband the owner of the wife's half of the post-1927 community property during his lifetime.

Moreover, the test of ownership is of particular significance because the principal issue involved here is whether petitioner is entitled to deduct one-half of a loss incurred from the sale during administration of community property acquired after July 29, 1927. The question of control over property upon which a loss has been sustained is not important in determining who sustained the *loss,* regardless of whether it might be important in determining who shall return the *income* from property. Only the owner of the property sustains the loss; and only the owner is permitted to deduct it.

Finally, our contention that ownership is the test is sustained by *Commissioner v. Larson,* supra, in which the Court stated:

> "Petitioner contends that 'ownership' is again the test to be used in solving the question, while respondent contends that the test is 'receipt and control during administration * * * not ultimate beneficial interest' * * * *We think the test of ownership is applicable here* (131 F.2d at 86, 87)."

C. DURING THE PERIOD OF ADMINISTRATION OF HER HUSBAND'S ESTATE THE WIFE IS THE OWNER OF ONE-HALF THE COMMUNITY PROPERTY ACQUIRED AFTER JULY 29, 1927

On July 29, 1927, California Civil Code Section 161a became effective. It provides as follows:

> "§161a. The respective interests of the husband and wife in community property during continuance of the marriage relation are *present, existing* and *equal* interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property."

Notwithstanding the husband's powers of management and control conferred by Sections 172 and 172a of the Civil Code, and expressly reserved to him by Section 161a, the latter section confers ownership of one-half the community property upon the wife at the time of its acquisition. Consequently, one-half the income from such property is taxable to her during the husband's lifetime. *Malcolm v. U. S.* (1931), 282 U.S. 792; *Poe v. Seaborn* (1930), 282 U.S. 101.

Furthermore, the wife is so far the owner of her one-half that it cannot be included in her husband's gross estate for the purposes of the estate tax prior to the effective date of the Revenue Act of 1942. *U. S. v. Goodyear* (C.C.A. 9, 1938), 99 Fed.(2d) 523; *Sampson v. Welch* (1938), 23 Fed. Supp. 271, 40 Fed. Supp. 1014, affirmed (C.C.A. 9, 1943), 138 Fed.(2d) 417.

Upon the husband's death the wife's one-half of such property *belongs* to her under Section 201 of the *Probate Code*, which provides as follows:

> "§201. *Succession.* Upon the death of either husband or wife, one-half of the community property *belongs* to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof *goes to* the surviving spouse, subject to the provisions of sections 202 and 203 of this code."

There is nothing in these code sections, nor in any other law of California, to justify the conclusion that the wife ceases, upon her husband's death, to be the owner of a property interest which she had during his lifetime. The only effect of the husband's death on the wife's one-half of such community property is to make her ownership of it absolute. The husband's powers of management and control are swept away; and the only restrictions left upon the wife's ownership are those attributable to the limited powers of her husband's personal representative, to-wit, the power to take possession of the property and to apply it to the extent necessary to pay debts, under Section 202 of the Probate Code, which provides in part as follows:

> "§202. Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration and disposal under the provisions of Division III of this code; * * *"

These powers were possessed by the husband during his lifetime, and they were not sufficient even when combined with his broad powers of management and control to make him the owner of her half. During his lifetime he could sell, invest and reinvest the entire community property and dispose of it in any other way he saw fit, except that he could not make a gift of it without the wife's consent (*Cal. Civil Code,* Sec. 172). These rights disappear upon his death. If the husband, with such broad powers, was not the owner of the wife's half during his lifetime, how then can his estate become the owner of it when the powers of his personal representatives are so much more limited? In *Poe v. Seaborn,* supra, the United States Supreme Court pointed out in respect to Washington community property that "The law's investiture of the husband with broad powers, by no means negatives the wife's present interest as a co-owner". It is inconceivable, then, that the narrow powers of the husband's personal representative could "negative the wife's present interest as a co-owner".

This analysis of the effect of the husband's death on the wife's interest was confirmed by *Sampson v. Welch,* supra, holding that the wife's half of the community property acquired after 1927 is not part of the husband's gross estate for estate tax purposes. In the *Sampson* case the court stated:

> "The wife's interest under section 161a exists during her husband's lifetime. His death merely lifts the restrictive limitations to which it was subject under sections 172 and 172a, except in so far as section 202 subjects it to his debts. On his death, the property interest belongs to the wife, not to the husband's estate. Consequently, it cannot be included in his gross estate in computing estate taxes." (23 Fed. Supp. at 281)

It is perhaps important to note that the Commissioner's position, like that of The Tax Court, is based entirely upon the *Rosenberg* and *Larson* cases. Prior to the time these cases were decided the Commissioner ruled in G. C. M. 20472, 1938-2 C. B. 158, that ownership of one-half the post-1927 community property is vested in the widow during the period of administration, and that accordingly one-half of any gain or loss realized on the sale thereof during such period should be treated as gain or loss of the widow. Petitioner's arguments are well expressed by the Commissioner himself in G.C.M. 20472, which stated as follows:

> "Although the community property of the widow is subject to community debts and is under the control of the probate court pending satisfaction of such debts, this does not appear to constitute an important variation in the status existing prior to the death of the husband. At all times prior to the death of the husband the community property was subject to the debts of the community and was subject to control and disposition by the husband. Yet, during that time one-half the income from the community property was regarded as taxable to the wife. Upon the death of the husband, title to one-half of the property remains in the widow, the property remains subject to community debts as it was prior to the death of the husband, and the control over the property by the probate court appears to be no greater than that previously exercised by the husband. Accordingly, there appears no compelling reason for a change of the status of the community property for purposes of Federal income tax."

In G.C.M. 23811, I.R.B. 1943-16-11517, the Commissioner reversed his original position as stated in G.C.M. 20472;

and a study of the later ruling indicates clearly that the reversal was based entirely upon his interpretation of the *Rosenberg* and *Larson* cases.

As we have pointed out, the *Rosenberg* and *Larson* cases involved issues entirely distinct from the issue involved here, and we submit that the irresistible logic of the situation compels the conclusion that the widow remains the owner of one-half the California community property after the husband's death, as she was before, and that consequently she is entitled to deduct one-half the losses on the sale of such property after the husband's death, as she was before.

Subordinate issues.

Petitioner's position on the subordinate issues rests upon the same grounds as does her position on the principal issue. Since the taxes involved were paid on property of which she was the owner of one-half, and were paid with funds of which she was the owner of one-half, it follows that she is entitled to deduct one-half the payments. Since she was already the owner of one-half of the funds with which the executrix' fee was paid, only the other one-half constituted income to her.

CONCLUSION

The principal question to be decided in this case is whether the widow is entitled to deduct one-half the loss on the sale of post-1927 community property during administration of her husband's estate.

We contend that she is entitled to deduct one-half the loss because she was the owner of one-half the property, and because a loss on the sale of property is sustained by the owner of that property and by no one else.

We say that there is no legal basis for the theory that the ownership of one-half the community property, vested in the wife both before and after the period of administration, departs from her at the beginning of that period and reverts to her at the end of it.

We say also that the executor's control of the community property is no greater, but actually less, than the husband's control; that the liability of the property to debts during administration is merely a continuance of its liability to debts during the husband's lifetime; and that since these characteristics of the property do not prevent recognition of the wife's one-half interest for tax purposes during the husband's lifetime, neither should they do so after his death.

The *Rosenberg* case does not support The Tax Court's decision because it involved pre-1927 California community property, as to which the wife admittedly had no ownership prior to her husband's death; the present case involves post-1927 California community property, as to which the wife is the owner of a one-half interest from the time of its acquisition.

The *Larson* case does not support The Tax Court's decision because it involved Washington community personal property, title to which during administration is vested in the executor. The California law does not vest the executor with title to the wife's interest in post-1927 community property during administration.

Moreover, the *Rosenberg* and *Larson* cases both involved *income* from community property, whereas here we are concerned with *losses*. Whatever might be said as to ownership of the income received by the executor during administration, the property itself unquestionably continues to be owned one-half by the wife; there is nothing in the law to justify the assumption that what is vested in her before and after the period of administration is not hers during that period.

Since the wife continues to be the owner of one-half the property during administration, no one but she can be entitled to deduct a loss sustained on the sale of such one-half during that period. To allow the loss to the estate is to permit it to reduce its tax liability by a loss it has not suffered.

San Francisco, California,
September 14, 1945.

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